

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12-08-2008

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM
AND
THE HONOURABLE MR.JUSTICE R.SUBBIAH

O.S.A.No.178 of 2009

and

M.P.NO.1 of 2009

1.M/s Srishi Estates & Investments Pvt.ltd.,
rep. by its Managing Director
Mr.V.Subbaiah

2.V.Subbaiah

3.Sri V.Sp.Sakthivel Raja

4.M/s Sakthi Builders Pvt. Ltd.,

rep. by its Director

Sri V.Sp.Sakthivel Raja

.. Appellants/Applicants

Applicants/Respondents/Defendants

vs

1. Upasana Finance Limited

rep. by its Manager

Finance & Secretary

Mr.R.Krishnasn

1st Respondent/1st Respondent/

1st Respondent/Petitioner-Decree

Holder/Plaintiff.

2. Haja Moydeen

..... Respondents/2nd Respondents

2nd Respondent/2nd Respondent

Third Party/Third party

Original Side Appeal filed under Order XXXVI Rule 1 of the
Original Side Rules read with Clause 15 of the Letters Patent Appeal
against the fair and decretal order dated 19.1.2009 in Application
Nos.4261 and 4262 of 2008. Application No.29/2001 in EP No.15/2000 in
C.S.No.313/99.

For Appellants

: Mr.M.Sundar

For Respondent No.1

: Mr.B.T.Seshadri

JUDGMENT

(Judgment of the Court was delivered by M.CHOCKALINGAM, J)

This appeal challenges the order of the learned Single Judge dated 19.1.2008 made in Application Nos.4261 and 4262 of 2008 whereby the order of the learned Master was affirmed.

2. The Court heard the learned counsel on either side.

3.This appeal has arisen under the following circumstances:

a. The first respondent filed a suit in C.S.No.313 of 1999 seeking recovery of money on the financial transaction entered into between the parties. A compromise decree was made on 21.6.1999 and it was agreed between the parties that the appellant/Judgment debtor must take a financier to the decree holder company and on a letter of request, inspect the documents which were in the custody of the decree holder company and to make the payment of Rs.60,00,000/- in full quit on or before 30.6.1999 and in default, the suit claim along with interest prayed for is payable by the Judgment debtor. The decree holder company filed E.P.No.15 of 2000, since default was committed by the Judgment debtor and hence he is entitled to make the claim as made in the plaint for the total amount and the interest accrued thereon at 36%. p.a.

b. Pending the same, appellants filed Application No.29 of 2001 before the Master under Section 47 of the Civil Procedure Code, inter alia, stating that the second respondent who was ready and willing to purchase the property with whom the appellant/Judgment debtor entered into an agreement in respect of the very same property and though the appellant along with the second respondent went over to the office of the decree holder company and sought inspection of original title deeds, the documents were not shown to them and the conduct of the company was evasive. Under such circumstances, the payment of Rs.60 lakhs could not be made as per the first clause of compromise decree. Hence, the delay was on the part of the decree holder and hence the application has two parts. The first part was when a letter of inspection was to be made by the Judgment debtor along with the financier, the duty was cast upon the decree holder company to produce the documents, but on 22.6.1999 when an attempt was made, the decree holder company failed in its duty and thus having not performed its part of the duty, as found in the compromise, the decree holder cannot be allowed to take advantage by making an application for execution as per the second clause of the compromise decree for full amount as prayed for in the plaint.

4. The application was stoutly opposed by the decree holder before the Master and the learned Master made an order of dismissal

which was the subject matter of challenge before the learned Single Judge.

5. Learned Single Judge on scrutiny of the materials available, took the view that the order of the learned Master was not to be disturbed and thus by rejecting the contention put forth by the appellant, dismissed the application. Under such circumstances, the appeal has arisen before this Court.

6. The Court heard the learned counsel on either side.

7. Advancing arguments on behalf of the learned counsel for the appellants, he would submit that it is true that a compromise decree was entered into between the parties and as per the compromise decree, an amount of Rs.60,00,000/- was payable in full quit on or before 30.6.1999. Sincere attempt was made by the appellant/judgment debtor by taking the second respondent financier to the decree holder company on 22.6.1999. Learned counsel would further add that the compromise decree came to be passed on 21.6.1999 and there was a compromise talk few months back and thus the second respondent was ready and willing to purchase the property and the decree was passed on 21.6.1999. The appellant/Judgment debtor, took the second respondent financier with whom he entered into an agreement for sale of respective property to the office of the decree holder company for inspection of document, but they were not allowed to peruse the document. Learned counsel for the appellants took the Court to the first part of the compromise decree wherein it is stated that on a letter of request made before the decree holder company, it has to make arrangements for production of document for scrutiny by the financier, but the decree holder refused to do so. Under such circumstances, the first part of the decree could not be performed by the judgment debtor.

8. In the instant case, on the side of the appellant, PW1 was examined, who is shown as third appellant, has categorically spoken to the fact that on 22.6.1999 he along with his father and the second respondent financier went to the decree holder company submitted a letter of request seeking permission to peruse title deeds which had been deposited with the first respondent/decreed holder that the said letter itself was written to the dictation made by the decree holder and the decree holder promised to allow the financier to peruse the document at a later point of time; Learned counsel for the appellant would further add that there was a specific averment in the affidavit filed in support of the application and counter was filed on the respondent side, stating thorough denial of the said fact that of meeting held on 22.6.1999, but this fact was spoken to by PW1. Apart from that, on the side of the decree holder company, two witnesses were examined. RW1 and RW2, who are Secretary and President of the decree holder company respectively,

categorically admitted that there was a meeting held on 22.6.1999. If to be so, in the counter affidavit , it was denied that the meeting was held on that day and also the fact that the judgment debtor has taken the second respondent financier. Thus, it would be indicative of the fact of non performance of duty on the part of the decree holder. Under such circumstances, non compliance of the first part of the compromise decree was due to the delay caused and evasive process definitely on the part of the decree holder and not at all by the judgment debtor. Under such circumstances, the Original Side appeal should have been ordered.

9. Added further learned counsel that there was an agreement between the appellant and the second respondent financier on 22.6.1999 and the second respondent has also filed C.S.No.960/200 for the relief of specific performance and this fact was also in full support of the contentions put forth by the appellant case.

10. Learned counsel appearing for the second respondent also put forward his submission in support of the case of the appellant.

11. Contrary to the contention, learned counsel for the respondent would submit that actually on 22.6.1999, there was a no meeting as one admitted in the compromise and no financier was taken to the decree holder company and no letter of request was made on behalf of the appellant and hence no question of production of document would arise and further insofar as the first clause is concerned, if no payment was not made on or before 30.6.1999 the judgment debtor was liable to make full payment as per the prayer made in the plaint. Under such circumstances, in order to escape from the liability of paying the decree amount, he has failed to do so. The Master has marshalled the evidence and has taken a correct view which was subsequently affirmed by the learned Single Judge and hence the appeal has got to be dismissed as one meritless.

12. The Court considered the submissions made on either side and also looked in to the materials available.

13. It is not in controversy that the compromise decree was made in C.S.NO.313 of 1999 on 21.6.1999. The compromise decree consists of seven clauses which are extracted as under.

i) that the defendants herein do pay to the plaintiff herein a sum of Rs.1,24,81,030/- (Rupees one crore twenty four lakhs eighty one thousand and thirty only)

ii) that if the defendants pay a sum of Rs.60,00,000/- (rupees sixty lakhs only) on or before 30th June 1999, the plaintiff herein shall enter full satisfaction of this

decree.

iii) that if the defendants herein fail to pay them sum of Rs.60,00,000/- (Rupees sixty lakhs only) on or before 30th June 1999 as mentioned in clause 2 supra, the plaintiff herein shall execute this decree on or after 1st July 1999 for the sum of Rs.1,24,81,030/- (Rupees one crore twenty four lakhs eighty one thousand and thirty only) with further interest at the rate of 36% per annum at monthly rates from this date till the date of realisation.

iv) that the mortgage created by the defendants 2 and 3 herein over the property, morefully set out in the schedule 'A' hereunder by way of depositing title deeds, shall continue till the entire decree amount is paid and defendants 2 and 3 herein shall not alienate by way of sale or mortgage the said properties in any manner till the entire decree is satisfied.

v) that the plaintiff herein shall release and relinquish the charge on the property morefully set out in the schedule hereunder on which defendants 2 and 3 had created an equitable mortgage by depositing the original title deeds, on receipt of a sum of Rs.60,00,000/- (Rupees sixty lakhs only) on or before 30th June 1999 as mentioned in the clause (2) supra, from any proposed financier of defendant's choice.

vi) that in such an eventuality, the plaintiff herein shall hand over the documents directly to the proposed financier on receipt of the said sum of Rs.60,00,000/- (Rupees sixty lakhs only) with the consent of the defendants herein and the plaintiff herein shall allow the proposed financier to inspect the original title deeds at its premises during office hours only on receipt of prior written instruction from the defendants herein.

Vii) that in case of default in payment of the amount on the due date as mentioned above and in the event of the plaintiff herein executing the decree, the plaintiff shall sell the properties set out in the schedule 'A' here under.

14. From the reading of the compromise decree, it would be quite clear that the first part would stipulate that if the amount of Rs.60,00,000/- paid on or before 30.6.1999, the claim would be wiped out. It is an admitted position that the payment of Rs.60,00,000/- was not made on or before 30.6.1999 and having failed to do so, the appellant has come forward with a plea that he has pleaded before the Master and also before the learned single Judge that a compromise

was made on 22.6.1999; he took the second respondent financier and sought for inspection of the document, since the second respondent was ready and willing to purchase the property, but the decree holder company has not allowed them to peruse the documents. Under such circumstances, the first part of the compromise decree could not be given effect to. In order to maintain this contention, learned counsel took the Court to the averments contained in the affidavit filed in support of the application, counter affidavit and also the evidence of PW1, RW1 and RW2. On a perusal, this Court is afraid whether it can agree with the contention of the learned counsel for the appellant. In the instant case, it was specifically agreed that if the amount of Rs.60 lakhs was paid on or before 30.6.1999, the entire claim would be wiped out, if there is any default on the part of the Judgment debtor, he is liable to make the entire amount decreed. The only contention put forth before the Court is that there was a compromise decree dated 21.6.1999 and as could be seen from the compromise decree, it was for the judgment debtor to take a financier to the decree holder company and on a letter of request, all the documents in the custody of the decree holder should be placed for inspection. It is true that a compromise decree was made on 21.6.1999. It is also evident from the evidence of PW1 that he along with his father and the second respondent herein went over to the decree holder company for perusal of the original title deeds. At this juncture, as could be seen, a letter of request has been made for inspection of documents. If it was true and as per the evidence of PW1 though he produced a letter of request, neither he retain a copy of the same, nor there was any acknowledgment for such a letter of request made before the company. It is the case of the first appellant that an agreement of sale has been entered into between him and the second respondent and pursuant to which, a suit has also been filed in C.S.No.960 of 2000 by the second respondent financier for specific performance of the contract of sale. Now, at this juncture, it remains to be stated that the compromise decree was entered into between the parties on 21.6.1999 and the alleged agreement of sale between the appellant and the second respondent financier has come into existence as per their case on 22.6.1999. Further, the actual amount which was agreed to be made on or before 30.6.1999 was actually Rs.60 lakhs and on strength of the agreement, a civil suit filed in C.S.960 of 2000 by the second respondent for a consideration of Rs.50 lakhs, which would cast doubt in the minds of the Court. Further, it was really true that such a financier was actually taken to the decree holder's company and when he was a party to the application made before the Master, there cannot be any impediment for the financier to get into the box in order to prove the fact. Number of suggestions were put to RW1 and RW2. Even assuming, there was a meeting held on 22.6.1999, between the plaintiff company and also the judgment debtor, that would not be sufficient. It is made clear that the financier was ready and willing to purchase the property. Though the evidence in that regard is more

important, the presence of judgment debtor and the decree holder was not specified in the first part of the compromise decree. In the absence of any evidence to that effect and also as to any letter of request made for inspection of the document, and also the fact that the agreement for sale was made on 22.6.1999, i.e. the very next day of the compromise decree, they are nothing, but only created for the purpose of escaping from the liability. Added circumstances, the Civil suit has been filed by the second respondent in C.S.No.960 of 2000 seeking the relief of specific performance, that too, where the consideration was shown only as Rs.50 lakhs. All would go to show that the learned Single Judge was perfectly correct in rejecting the contentions put forth by the learned counsel for the Judgment debtor and dismissed the applications. This Court is unable to notice any merit in the contention put forward by the learned counsel for the appellants and it was rightly rejected too by the Master and hence the Original Side appeal is liable to be dismissed and accordingly the same is dismissed. No costs. Consequently, M..No.1 of 2009 is also dismissed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

VJY

To

The Sub Asst.Registrar,
Original Side,
High Court, Madras.

OSA.NO.178 OF 2000

VSN {CO}
TP/26.8.2009.

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